IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs November 5, 2002

# TERRY LEE VESTAL v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Gibson County**
**No. 15519 L.T. Lafferty, Judge**
**Dick Jerman, Jr., Judge[1]**

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**No. W2002-00381-CCA-R3-PC - Filed May 22, 2003**

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The petitioner, Terry Lee Vestal, was convicted by a jury in the Gibson County Circuit Court of rape of a child, a Class A felony. The trial court sentenced the petitioner as a Range I standard offender to twenty-five years in the Tennessee Department of Correction. Following an unsuccessful appeal of his conviction, the petitioner filed a petition for post-conviction relief, alleging, among other grounds, ineffective assistance of counsel. The petitioner now brings this appeal challenging the post-conviction court's denial of his petition for relief. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court. However, we note that the judgment of conviction reflects that the petitioner was sentenced as a Range I standard offender with a release eligibility of thirty percent (30%). Because a child rapist must serve one hundred percent (100%) of his sentence with no potential for earning sentence reduction credits, we remand for the correction of the judgment of conviction. Tenn. Code Ann. § 39-13-523(c)-(d) (1997).

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed and Remanded.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and ROBERT W. WEDEMEYER, J., joined.

Donnie W. Knott, Milan, Tennessee, attorney for the appellant, Terry Lee Vestal.

Paul G. Summers, Attorney General and Reporter; P. Robin Dixon, Jr., Assistant Attorney General; and Elizabeth T. Rice, District Attorney General Pro Tem, for the appellee, State of Tennessee.

## OPINION

## I. Factual Background

[1] Judge Dick Jerman, Jr., who presided over the petitioner's trial, died prior to the petitioner's post-conviction proceedings.

In reviewing the petitioner's post-conviction claim, we summarize the facts leading to the petitioner's conviction as set forth in this court's opinion on direct appeal. State v. Terry Vestal, No. 02C01-9812-CC-00384, 1999 Tenn. Crim. App. LEXIS 1182 (Jackson, Nov. 22, 1999). The testimony at trial established that the seven-year-old victim and her mother lived next door to the petitioner and his wife. Id. at **1-2. On two occasions, the victim and her four-year-old brother spent the night at the petitioner's residence. Id. at *2. The victim testified at trial that on one of these occasions, "'I was laying down on the couch asleep and my pants was [sic] down and [the petitioner] was licking my privates.'" Id. The victim told the petitioner to stop. Id. Kimberly Whitten, the victim's mother, testified that on a subsequent evening, she, her husband, her children, and her nieces and nephews went to the petitioner's residence. Id. at *3. Upon returning home, "the victim related to her mother inappropriate remarks which the [petitioner] had made to the children earlier that evening. . . . [T]he victim then advised her mother of the instant act of sexual abuse which occurred during her previous overnight visit." Id. Two of the victim's cousins who were present that evening also testified to the petitioner's inappropriate remarks. Id.

At trial, the petitioner admitted that the victim and her brother spent the night at his residence; however, he denied any sexual contact with the victim. Id. at *4. "He claimed that the victim concocted this story because he became angry with Ms. Whitten after she permitted four year old Joey to enter his home drinking a beer. . . . After an exchange of some cross words between Ms. Whitten and the [petitioner] regarding Joey's actions, [the petitioner] testified that Ms. Whitten said, 'you s.o.b. You'll pay.'" Id. at **4-5.

On cross-examination, the petitioner testified that he went to bed before the children. Id. at *5. He related that on the night he allegedly made the inappropriate comments, the children spilled flea powder on his dog and he told them, "'you've got that all over [the dog]. If he licks that, he's going to kill the puppies.'" Id. The petitioner's wife testified that she never observed any inappropriate conduct between her husband and the victim. Id. She stated that the petitioner was in bed with her the two evenings the children stayed at their home. Id. She added that the victim and her brother continued to visit after the alleged offense. Id. at *6.

Based upon the foregoing testimony, the jury convicted the petitioner of rape of a child. The trial court sentenced the petitioner as a Range I standard offender to twenty-five years incarceration. The petitioner filed a direct appeal, challenging the sufficiency of the evidence. The petitioner argued on direct appeal that the State failed to prove penetration. This court found no error and affirmed the petitioner's conviction and sentence. Id. at *11.

Thereafter, the petitioner timely filed a pro se petition for post-conviction relief, alleging, among other grounds, ineffective assistance of counsel at trial and on appeal. The post-conviction court appointed counsel and held an evidentiary hearing. At the conclusion of the testimony, the post-conviction court took the matter under advisement. The post-conviction court subsequently entered an order denying the petition, finding the allegations raised in the petition to be without merit. On appeal, the petitioner challenges the post-conviction court's finding that he

received effective assistance of counsel at trial.[2] Specifically, the petitioner contends that trial counsel (1) failed to properly investigate and prepare for trial; (2) performed inadequately at trial; and (3) failed to request a competency hearing to determine whether the petitioner was competent to stand trial. The petitioner asserts that trial counsel's deficient performance prejudiced his defense.

## II. Analysis

In a post-conviction proceeding, the petitioner bears the burden of proving the grounds raised in the petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f) (1997). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). On appeal, a claim of ineffective assistance of counsel presents a mixed question of law and fact subject to de novo review. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). As such, the post-conviction court's findings of fact are entitled to a presumption of correctness unless the evidence preponderates against those findings. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, a post-conviction court's conclusions of law, such as whether counsel's performance was deficient or whether that deficiency was prejudicial, are subject to a purely de novo review with no presumption of correctness. Id.

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, "the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)).

> Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.

Id. at 370.

To establish constitutionally deficient performance, the petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88, 104 S. Ct. at 2064; Burns, 6 S.W.3d at 462. Specifically, the petitioner must show that counsel's performance was not within "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). On appeal, this court will neither "second guess" the tactical and strategic decisions of defense counsel, nor measure the representation by "20-20 hindsight." Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993). To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

[2] Although the petitioner challenged the effectiveness of appellate counsel in his petition for post-conviction relief and at the evidentiary hearing, the issue was not raised on appeal. Moreover, the additional grounds for post-conviction relief alleged in the petition and argued at the evidentiary hearing have not been challenged on appeal.

reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; see also Dean v. State, 59 S.W.3d 663, 667 (Tenn. 2001).

The petitioner first complains that trial counsel failed to properly investigate and prepare for trial. The petitioner argues that trial counsel met with the petitioner only three times and spent only ten to twenty hours working on his case. Additionally, the petitioner contends that trial counsel should have interviewed the other children present the night the petitioner allegedly made inappropriate comments, which comments resulted in the victim telling her mother about the rape. Specifically, the petitioner asserts that trial counsel should have interviewed Kathy Renee Gray, Whitten's older daughter, who was present both when the petitioner made the alleged inappropriate comments and when the victim told Whitten about the rape.

"When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). A petitioner is not entitled to relief on this ground "unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called." Id. at 758. At the evidentiary hearing, the petitioner failed to produce as witnesses any of the children whose testimony he claimed would have been favorable to his defense. Accordingly, he is not entitled to relief on this ground.

We also cannot conclude that trial counsel was deficient in his preparation for trial. At the evidentiary hearing, both trial counsel and the petitioner testified that the petitioner's defense at trial was that he did not commit the offense. Trial counsel explained that the defense was "straightforward," with the victim alleging that the petitioner raped her and the petitioner alleging that he did not. According to trial counsel, the case did not require a great deal of investigation. Although trial counsel could not recall the number of times he met with the petitioner prior to trial, he related that he spent ten to twenty hours on the case. Absent evidence to the contrary, we cannot conclude that this preparation was inadequate in light of the petitioner's defense that he did not commit the offense.

Next, the petitioner asserts that trial counsel's performance at trial was deficient. The petitioner contends that in his opening statement, trial counsel presented the petitioner's defense theory and asserted that Whitten's allegations were motivated by revenge. However, the petitioner claims that "[t]rial [c]ounsel [immediately] destroyed the defense theory by stating to the [j]ury, 'I'll be honest with you. It doesn't answer why a five, six or seven year old child says something of this nature.'" The petitioner also contends that by asking the victim to recount her story on cross-examination, trial counsel "inflamed the jury against [the petitioner], and just reinforced what the minor child had just testified to." Additionally, the petitioner argues that trial counsel should have discredited Whitten's testimony at trial by addressing the conflicts in her testimony at the preliminary hearing and her "dishonesty" in applying for federal assistance. The petitioner insists that trial counsel's deficient performance "prejudiced the [p]etitioner to such a degree that the [p]etitioner

feels confident that had he been properly represented, the results of the trial would have been different."

At the evidentiary hearing, trial counsel testified that he discussed all possible defense theories with the petitioner, but the petitioner maintained that he "didn't do it." Trial counsel related that the petitioner informed him that Whitten's allegations were motivated by revenge. Counsel presented that motive to the jury in his opening statement and through the petitioner's testimony. Trial counsel explained that, when he commented in his opening statement that he did not know "why a five, six or seven year old child says something of this nature," he was indicating that the petitioner was not required to answer that question because it was the State's burden to prove that the petitioner had committed the offense. Moreover, contrary to the petitioner's argument on appeal, trial counsel testified that he did use Whitten's conflicting testimony as "ammunition . . . to attack the credibility of the State's case." However, he made the tactical decision not to question her at trial regarding her dishonesty in applying for federal assistance because he did not want to appear to be "attacking" the victim's mother when there was no evidence "to back [the allegations] up." Finally, trial counsel conceded that having the victim recount the offense on cross-examination "may not have been the best strategy," but he did so in an attempt to obtain information "to use in argument down the road."

As previously noted, we will not "second guess" the tactical and strategic decisions of trial counsel or measure the representation by "20-20 hindsight," particularly where there has been no evidence presented to show that such a decision amounted to deficient representation. We conclude, as did the post-conviction court, that the petitioner has failed to demonstrate that trial counsel's performance was not within the range of competence demanded of criminal defense attorneys. Because the petitioner has failed to demonstrate deficient performance on the part of trial counsel, we need not address prejudice.

Finally, the petitioner contends that trial counsel was ineffective in failing to request a competency hearing to determine whether the petitioner was competent to stand trial. The petitioner argues that, had there been a competency hearing, he "would have been found incompetent to stand trial . . . due to not receiving his medication as prescribed."

Compelling a mentally incompetent defendant to stand trial violates his right to due process of law. Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 903 (1975). To this end, the United States Supreme Court set forth the following test to determine a defendant's competency to stand trial:

> whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.

Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 789 (1960). In other words, the defendant must be able to understand the nature and object of the proceedings against him, to consult with

counsel, and to assist in preparing his defense. Drope, 420 U.S. at 171, 95 S. Ct. at 903; see also State v. Black, 815 S.W.2d 166, 173-74 (Tenn. 1991).

At the evidentiary hearing, the petitioner testified that he had suffered from mental illness since 1980, explaining that his illness had to be controlled by medication. The petitioner stated that in the preceding twenty years he had been treated at the Western Mental Health Institute ("WMHI") approximately seventeen times and that he received counseling at the Carey Counseling Center ("CCC"). The petitioner described his trial as a "blackout" due to the jail not providing his medication. Although he conceded that he did not ask trial counsel to request a competency hearing, the petitioner testified that trial counsel was aware of his mental illness and should have requested one.

Regarding his competency to stand trial, the petitioner acknowledged that he had previously been in court on numerous charges and understood the role of the trial court, the prosecutor, and defense counsel. The petitioner related that prior to trial, he did not "really understand" the charges against him, but that trial counsel informed him that he would not be convicted of rape because "there had been no penetration." The petitioner claimed that, until the day before the post-conviction hearing, he had "never heard" that he had been accused of performing cunnilingus on the victim. The petitioner maintained that because he "didn't do it," he did not accept the State's plea offer of eight years incarceration. However, the petitioner related that he did not understand that he could receive a harsher sentence by going to trial.

At the evidentiary hearing, trial counsel conceded that he was aware that the petitioner had a history of mental illness. However, trial counsel testified, "I never saw anything in our dealings that led me to believe that [the petitioner] was not competent to understand what was going on in his case and competent to assist me. If I had, I would've asked for a competency hearing." Trial counsel related that the petitioner "seemed to understand" the nature of the charges against him and the roles of the prosecutor, defense counsel, and the trial court. Trial counsel stated that the petitioner cooperated with him "fully and intelligently," providing counsel with a defense and the names of witnesses. Trial counsel testified that the petitioner never complained about not receiving his medication while in jail. Trial counsel stated, "I thought he maintained himself and was quite calm under the circumstances."

Medical records introduced into evidence reflected that on February 23, 1998, the petitioner was admitted to WMHI while incarcerated at the Gibson County jail after the petitioner threatened to kill other inmates and himself. The petitioner was diagnosed with bipolar disorder, but discharge records indicated that the disorder was "under good control." The medical records did not address the petitioner's competence to stand trial.

On appeal, the petitioner argues that based on trial counsel's knowledge of the petitioner's mental illness and commitment to Western Mental Health Institute, "it [was] not reasonable for [t]rial [c]ounsel not to . . . request[] a competency hearing." However, we note that not every person affected by a mental illness is thereby rendered incompetent to stand trial.

Wilcoxson v. State, 22 S.W.3d 289, 305 (Tenn. Crim. App. 1999). In fact, "evidence of [the petitioner's] past psychiatric problems does not necessarily require counsel to ask for a competency hearing if the petitioner's behavior does not reflect incompetence at the time of trial or while his attorney is preparing for trial." Id. at 310.

Nothing in the record reflects that the petitioner was not competent to stand trial. Although the petitioner was diagnosed with bipolar disorder, the medical records reflected that this disorder was treated with medication and "under good control." As we noted, the petitioner did not inform trial counsel that the jail was not providing his medication. Moreover, based on his interaction with the petitioner prior to trial, trial counsel had no reason to question the petitioner's competency. The petitioner cooperated with trial counsel and assisted in his defense. Accordingly, we conclude, as did the trial court, that trial counsel was not deficient in failing to request a competency hearing. This issue is without merit.

Although not raised by either party, we note that the judgment of conviction reflects that the petitioner was sentenced as a Range I standard offender with a release eligibility of thirty percent (30%). However, pursuant to Tennessee Code Annotated section 39-13-523(c)-(d), a child rapist must serve one hundred percent (100%) of his sentence with no potential for earning sentence reduction credits. See also Tenn. Code Ann. § 40-35-501(i) (Supp. 2002). Accordingly, we remand to the trial court for correction of the judgment of conviction reflecting that the petitioner is required to serve one hundred percent (100%) of his sentence.

## III. Conclusion

Based upon the foregoing, we affirm the judgment of the post-conviction court, but remand for the correction of the judgment of conviction consistent with this opinion.

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NORMA McGEE OGLE, JUDGE